

FCC MAIL SECTION

Federal Communications Commission

FCC 99-368

DEC 21 10 21 AM '99

Before the  
 DISPATCHED BY Federal Communications Commission  
 Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's	)	PR Docket No. 93-144
Rules to Facilitate Future Development of	)	RM-8117, RM-8030,
SMR Systems in the 800 MHz Frequency Band	)	RM-8029
	)	
Implementation of Sections 3(n) and 332 of	)	GN Docket No. 93-252
the Communications Act -- Regulatory	)	
Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253 ✓
Communications Act -- Competitive Bidding	)	
	)	

## SECOND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 23, 1999

Released: December 2, 1999

By the Commission:

1. The Commission has before it two petitions for reconsideration ("Petitions"), filed by the American Mobile Telephone Association (AMTA) and Small Business in Telecommunications (SBT) (collectively "Petitioners") on September 2, 1997.<sup>1</sup> Petitioners seek reconsideration of the *Memorandum Opinion and Order on Reconsideration (MO&O)* in

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<sup>1</sup> On September 2, 1997, the Industrial Telecommunications Association, Inc., filed a Petition for Clarification and Reconsideration of the *Second Report and Order* and *Memorandum Opinion and Order on Reconsideration* in the 800 MHz SMR proceeding. The Commission addresses those issues in the recently released *Memorandum Opinion and Order on Reconsideration of the Second Report and Order*. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Section 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration*, FCC 99-270 (rel. October 8, 1999).

which the Commission reconsidered the rules governing the upper 200 channels of the 800 MHz Specialized Mobile Radio (SMR) service.<sup>2</sup> No pleadings have been filed in response to these Petitions. For the reasons discussed below, we deny the Petitions.

2. First, Petitioners request reconsideration of the Commission's decision to modify its competitive bidding rules to eliminate installment payments and adopt larger bidding credits for entities qualifying as small businesses for the auction of the upper 200 channels of the 800 MHz SMR service.<sup>3</sup> Petitioners argue that the Commission's elimination of installment payments, less than ninety days prior to the short-form filing deadline for the 800 MHz SMR auction, was based on an inadequate record in the proceeding and was prejudicial to the interests of prospective small business applicants.<sup>4</sup> Second, SBT claims that the Commission acted in violation of its rules regarding delegation of authority<sup>5</sup> and the Administrative Procedure Act (APA),<sup>6</sup> by delegating the authority to set the level of upfront payments to the Wireless Telecommunications Bureau ("Bureau").<sup>7</sup> Third, SBT requests review of the Commission's decisions to license the upper 200 channels of the 800 MHz SMR spectrum in contiguous blocks<sup>8</sup>, eliminate the finder's preference program,<sup>9</sup> and use competitive bidding to license the upper 200 channels in the 800 MHz spectrum band.<sup>10</sup> Finally, SBT requests clarification of the Commission decision to require incumbents seeking geographic licenses to show that their external site facilities are constructed and operational.<sup>11</sup>

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<sup>2</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Section 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224, 12 FCC Rcd 9972 (1997).

<sup>3</sup> AMTA Petition at 1; SBT Petition at 18-19.

<sup>4</sup> AMTA Petition at 2-3; SBT Petition at 18-19.

<sup>5</sup> 47 C.F.R. §§ 0.131 and 0.331 (1997).

<sup>6</sup> 5 U.S.C. §§ 551 *et seq.*

<sup>7</sup> SBT Petition at 17.

<sup>8</sup> SBT Petition at 2-6.

<sup>9</sup> SBT Petition at 8-11.

<sup>10</sup> SBT Petition at 7.

<sup>11</sup> SBT Petition at 22.

3. On reconsideration, we affirm our decision to eliminate installment payments. At the outset, we note that Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.<sup>12</sup> By no means, however, has Congress dictated that installment payments are the only tool in assisting small business. Our experience with the installment payment program has led us to conclude that installment payments may not always serve the public interest. As we noted in the *MO&O*, the Commission has found that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.<sup>13</sup> Since the release of the *MO&O*, the Commission determined in its Part 1 rulemaking that, for the aforementioned reasons, installment payments should not be used in the immediate future as a means of financing small business participation in our auction program.<sup>14</sup> Moreover, in recent legislation, Congress dictated that certain future auctions effectively be conducted without installment payments.<sup>15</sup> After careful consideration,

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<sup>12</sup> Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." See 47 U.S.C. § 309(j)(4)(A) (emphasis added). See also Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

<sup>13</sup> See *MO&O* at ¶ 130.

<sup>14</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-92, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413, 13 FCC Rcd 374, 395-401 (rel. December 31, 1997).

<sup>15</sup> See Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). See also the Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997). Section 3007 of the Balanced Budget Act of 1997, which significantly amends Section 309(j) of the Communications Act, requires that:

The Commission shall conduct the competitive bidding required under this title or the amendments made by this title in a manner that ensures that all proceeds of such bidding are deposited in accordance with section 309(j)(8) of the Communications Act of 1934 not later than September 30, 2002.

The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007

we conclude that we have met our statutory obligations without offering installment payment plans for 800 MHz SMR licensees. We note further that in place of installment payments, we established larger bidding credits for the 800 MHz SMR auction to provide for qualifying small businesses.

4. We disagree with Petitioners' contentions that installment payments are necessary to ensure a meaningful opportunity for small businesses to participate in the 800 MHz SMR auction. Moreover, the rules were changed more than ten weeks before the filing deadline, providing an adequate opportunity for the parties to alter their business plans, if necessary. In this regard, we note that the elimination of installment payments and the timing of that auction did not prevent the participation of small businesses in the 800 MHz SMR auction, which concluded on December 8, 1997, and in which 52 of the 62 qualified bidders were eligible for small or very small business credits.<sup>16</sup>

5. Second, we reject SBT's claim that the Bureau's authority to set the level of upfront payments constitutes an illegal delegation of authority. Section 0.131 of the Commission's rules explicitly states that the Bureau has delegated authority to develop, recommend and administer policies, programs and rules concerning auctions of spectrum for wireless telecommunications.<sup>17</sup> In our Part 1 rulemaking, we clarified that pursuant to 0.131 of our rules, the Chief of the Wireless Telecommunications Bureau has delegated authority to implement all of the Commission's rules pertaining to auctions procedures.<sup>18</sup> This includes the authority to choose competitive bidding designs and methodologies; conduct auctions;

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"applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

<sup>16</sup> See "FCC Closes 800 MHz Specialized Mobile Radio Service Auction," *News Release* (rel. Dec. 8, 1997).

<sup>17</sup> 47 C.F.R. § 0.131(c).

<sup>18</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 5686, 5697-5698 (1997) (*Part 1 Order*), where the Commission noted that the Bureau should, to the extent possible, carry out its duties under this authority through the use of orders, public notices, bidder packages, notices disseminated through the electronic bidding system, and other reasonable means and with the benefit of public comment where appropriate. The Commission also noted that such Bureau actions would be subject to review by the full Commission. See also Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 454-456 (1997), in which the Commission clarified that the Bureau has the discretion to employ either minimum opening bids or reserve prices or both in future auctions after seeking comment from interested parties.

administer application, payment, license grant and denial procedures; and determine upfront and down payment amounts as well as minimum opening bids.<sup>19</sup> These actions do not fall under the prohibited activities set forth in Section 0.331 of the Commission's rules, which include acting upon complaints, petitions, requests, applications for review and notices of proposed rulemaking.<sup>20</sup> We conclude that the Bureau's actions are valid, as they affect procedural rather than substantive issues, and are, therefore, in compliance with our rules.<sup>21</sup> Furthermore, the Bureau's actions were in compliance with the APA. Pursuant to 5 U.S.C. § 553(b), an agency may modify procedural rules without notice and comment.<sup>22</sup> Because the rule modifications were procedural in nature and did not affect the substantive rights of interested parties, then the Bureau's actions fall within that exception.

6. Third, we dismiss as repetitious SBT's request that the Commission reconsider its decisions to allocate licenses in the upper 200 channels of the 800 MHz SMR spectrum in contiguous blocks, eliminate the finder's preference program, and use competitive bidding as the licensing mechanism for the upper 200 channels in the 800 MHz spectrum band, on the grounds that they were unsupported by evidence and therefore, arbitrary and capricious.<sup>23</sup> We disagree. These conclusions were set forth first in the *First Report and Order*, *Eighth Report and Order* and *Second Further Notice of Proposed Rulemaking*<sup>24</sup> in the 800 MHz SMR proceeding and reaffirmed in the *MO&O*. In each case, the Commission set forth reasoned explanations for its decision. Moreover, SBT raised many of the same issues brought up by

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<sup>19</sup> *Id.* See also 47 C.F.R. § 1.2104.

<sup>20</sup> 47 C.F.R. § 0.331.

<sup>21</sup> See In the Matter of Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and To Make Changes in the Delegated Authority of Other Bureaus, *Order*, FCC 95-213, 10 FCC Rcd 12751 (1995).

<sup>22</sup> 5 U.S.C. § 553(b).

<sup>23</sup> Section 1.429(i) of the Commission's rules states that the Commission may grant the petition for reconsideration in whole or in part or may deny the petition . . . Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious. See 47 C.F.R. § 1.429 (i).

<sup>24</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Section 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *First Report and Order*, *Eight Report and Order* and *Second Further Notice of Proposed Rulemaking*, FCC 95-501, 11 FCC Rcd 1463 (1995) ("*First Report and Order*").

petitioners in the *MO&O*. It is not in the public interest to revisit these issues.

7. Finally, we find it unnecessary to address SBT's request for clarification of the Commission's decision to require incumbents seeking geographic licenses to show that their facilities are constructed and operational. As we stated in the *First Report and Order*, such licensees are required to make a one-time filing of specific information for each of their external base station sites to assist the staff in updating the Commission database after the close of the auction for the upper 200 channels of the 800 MHz SMR spectrum. Under that decision, we also require evidence that such facilities are constructed and placed in operation and that, by operation of our rules, no other licensees would be able to use these channels within a geographic area.<sup>25</sup>

8. IT IS ORDERED that the Petitions ARE DENIED, for the reasons set forth above.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

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<sup>25</sup> 11 FCC Rcd 1463, 1514-1515.